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IN THE

Supreme Court of the United States

October Term 1969

No. 1134

DARWIN EARL SCHULTZ,

Petitioner,

vs.

Honorable MELVIN LAIRD, Secretary of Defense, and The Commanding Officer of Fort Leonard Wood, The Sheriff of Hennepin County, and The Agent in Charge of The Office of The F.B.I. in Minneapolis, Minnesota,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Decisions of Courts Below

The opinion of the District Court is reported in 303 Fed. Supp. 965 and is appendixed hereto as Appendix A. The opinion of the Court of Appeals is unreported and is appendixed hereto as Appendix B.

Jurisdiction

The judgment of the Eighth Circuit Court of Appeals was entered on October 29, 1969. Jurisdiction is conferred on this Court by 28 U.S.C., §1254(1).

Questions Presented

1. Did the government enter into a valid and binding contract with petitioner by an enlistment contract which provides that petitioner can be ordered to active duty for a maximum of forty-five (45) days, so that 28 U.S.C. App. §673(a) providing for a longer period of active duty, is limited by the express terms of said enlistment contract?

2. Is the petitioner entitled to a thirty (30) day notice to report for active duty under the provisions of 28 U.S.C. § 672(d) on an order to report for active duty under the provision of 28 U.S.C. § 673(a)?

3. In peacetime, may Congress, under War Powers granted to it under Article 1, §8, breach a National Guard enlistment contract so as to infringe on the personal liberties of the enlistee for an additional 685 days?

4. Can a National Guardsman, who has requested forms and information for discharge as a conscientious objector, be given an Order for activation under 28 U.S.C. § 673(a), without any process of this application?

5. Can a National Guardsman, who has been referred to the reclassification process by the Selective Service Local Board, under the terms of his written enlistment agreement, be subsequently thereto given an Order to active duty for not participating satisfactorily under the provisions of 28 U.S.C. § 673(a)?

6. Where petitioner, a National Guardsman in an inactive status, has claimed a conscientious-objector position under the Selective Service law and has no administrative remedy available without submitting to military service, does not the Court have jurisdiction to issue the writ and hold the petitioner in an inactive status?

STATUTORY PROVISIONS

A. The United States Constitution provides in relevant part as follows:

Fifth Amendment: "No person shall * * be deprived of life, liberty or property, without due process of law."

B. United States Statutes:

1. 28 U.S.C., §673(a)
2. 28 U.S.C., §672(d)

C. Cases in conflict:

Harmonson v. United States, —— F. Spp. ——, March 18, 1969.

United States v. Harmonson, —— F. 2d ——.

Schultz v. Clifford et al., —— Fed. Supp. ——.

Schultz v. Clifford et al., —— F. 2d ——.

Lurie v. United States, 402 F. 2d 297.

STATEMENT OF CASE

Petitioner enlisted in the Army National Guard of Minnesota on December 28, 1963. He served satisfactorily until February of 1967 when he decided that he could no longer participate in the required National Guard drills. This decision was based on petitioner's conscientious objection to killing and war. Petitioner has not participated in any National Guard activities since February of 1967.

On February 17, 1967, the commanding officer of petitioner's unit sent a DD form 44 to petitioner's Selective Service Local Board indicating that petitioner had ceased to serve satisfactorily as a member of the National Guard.

After receipt of the February 17th form, petitioner's Local Board withdrew his I-D classification and reclassified him I-A. Subsequent to being reclassified petitioner applied to his Local Board for classification as a conscientious objector. His application was denied and petitioner filed an appeal. On September 15, 1967, petitioner was notified that since his induction was not imminent his appeal would not be submitted to the appeal board until 120 days prior to his probable induction. No further action has been taken on this appeal.

In April of 1967, petitioner talked to his commanding officer about being discharged from the National Guard as a conscientious objector but was unable to "communicate" with him. On or about July 26, 1967, petitioner wrote to his National Guard unit requesting confirmation of his discharge from the National Guard and asking for a discharge if one had not already been granted. He also requested information on how to apply for conscientious objector status. In August of 1967, petitioner again wrote to his unit commander and the State Adjutant General requesting a discharge and a DA form

1049 in order to apply for discharge as a conscientious objector.

On August 14, 1967, a letter was sent to petitioner informing him that the appropriate forms for application were available at the Armory in Mankato and that it was necessary for him to come to Mankato to clear his records and to be informed of his rights. Petitioner denies receiving this letter. From the record it appears that from September of 1967 until January 2, 1968, petitioner had no further contact with the National Guard. On January 2, 1968, petitioner received orders to report for active duty on January 17, 1968 at Fort Leonard Wood, Missouri, for a period of one year, six months, and sixteen days, under 28 U.S.C. 673(a). On January 9, 1968, petitioner wrote to the Headquarters Fifth Army, Fort Sheridan, Illinois, requesting a rescission and postponement of his "induction notice" until his application for discharge had been processed.

Petitioner also contacted his attorney and a Mr. Sherk, the Executive Secretary of the National Service Board for Religious Objectors, in Washington D.C. Mr. Sherk contacted a Mr. Kenneth B. Haggett of the National Guard Office in Washington, who apparently assured Mr. Sherk that petitioner's order to active duty would be delayed or cancelled until petitioner's application for discharge was processed.

On or about February 1, 1968, petitioner received a telegram informing him that the order of January 2, 1968, had not been cancelled. On the 9th of February, petitioner received in the mail his honorable discharge from the Minnesota National Guard with the effective date of January 16, 1968. On May 30, 1968, an Absentee Wanted Form was issued, and on August 16, 1968, petitioner was arrested as a deserter.

ENLISTMENT AGREEMENT
(Age 17 through 25)

28 December 1963

In connection with my enlistment/in the Army National Guard of the State of MINNESOTA and */ as a Reserve of the Army for service in the Army National Guard of the United States* Army Reserve*, this date, I hereby agree to and understand that—

I incur a military service obligation of 6 years.

I will participate with my unit in scheduled training effective immediately.

I will enter on active duty for training for a period of approximately 26 weeks (enter time required for training in designated MOS) within 120 days of this date, unless a delay for a longer period is authorized by the Department of the Army. If I am a high school student, I may be delayed in reporting for active duty for training for not more than one year, until I graduate, until I cease to pursue such course satisfactorily, or until I become 20 years of age, whichever occurs earlier.

After completing the active duty for training, I will serve in the Ready Reserve for the remainder of my 6 year military service obligation. If for any reason I cannot satisfactorily complete the required training (schooling) in the MOS for which I originally entered on active duty for training, I will be required to accept training of a duration not to exceed 6 months to qualify in an alternate MOS as determined by the Army and/or my unit commander.

During my Ready Reserve service, both before and after my active duty training, I am required to participate satisfactorily in the scheduled drills (at least 48 each

year) and in the case of the /Army National Guard, attend field training at least 15 days each year/ Army Reserve, attend active duty for training not more than 17 days each year/ unless excused therefrom by proper authority. Should I be assigned to the Ready Reserve Mobilization Reinforcement Pool during the 6 year period, I will, when directed, perform not more than 30 days active duty for training annually.

I must, prior to moving to another location (town, city, community, state), report any change of address to my unit commander or his representative. Within 30 days after arriving at my new home of residence, I must report to the nearest Army National Guard Armory or U.S. Army Reserve Training Center for instructions and possible assignment. If, prior to this time, I have not performed my initial active duty for training as agreed to above, I realize that, at a time convenient to the Service but in any case before I have completed one year of my 6 year military service obligation, I must enter on *this* active duty for training or 6 months active duty for training as determined by the needs of the service in my new area of residence.

I must reply promptly to any military correspondence directed to me. I further understand that—

If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction.

In the event of war or national emergency declared by Congress, my enlistment, which would otherwise expire,

will be continued in effect until 6 months after the end of such war or emergency, unless sooner terminated.

DARWIN EARL SCHULTZ s/ Darwin Earl Schultz
(typed First, Middle, Last Name (Signature)
DWAYNE C. BOERNER s/ Dwayne C. Boerner
Capt. Inf MinnARRC (Signature)
(Typed Name Unit Commander or
Authorized Representative (Witness)

REASONS FOR GRANTING WRIT

The sanctity of contracts has been traditionally a corner stone of our constitutional system of government. The petitioner herein entered into a contract with the National Guard of the United States wherein he agreed to participate in the Reserve program for a period of six years. Likewise, the concern and protection of religious liberty and freedom of conscience has been a vital concern. In this case there exists a conflict between these liberties with a third factor interjected, a statute which by administrative fiat has attempted to be used to impose penalties upon both these rights.

The first contention of petitioner is that he entered into a contract which provided in clear and expressed terms that for not participating satisfactorily in the reserve program, he could be ordered to active duty for a *maximum* period of 45 days in one calendar year, or he could be caused to lose his 1-D deferment under Selective Service. This was on a form of contract drawn by the National Guard, not by the petitioner, and the government had clearly contracted away the right to impose more than 45 days of active duty. There is nothing in *this* contract in *this* case which indicates that *this* provision carries with it any of the connotation of Pfils v. Corcoran,

287 F. Supp. 554 (D. Colo. 1968) or Even v. Clifford, 287 F. Supp. 334 (S.D. Cal. 1968) upon which cases both the District Court of Minnesota and the 8th Circuit Court of Appeals have relied to deny to the petitioner the Writ of Habeas Corpus which he seeks in this proceeding. The petitioner in Even v. Clifford faced 24 months active duty under selective service, and the court found that he was not therefore prejudiced by active duty orders, under 673(a), to 18 months active duty. In the instant case, petitioner is not liable to 24 months, as his Local Board chose not to induct him because he had passed his 26th birthday. In all of those cases, the court has found that there existed within the terms of the Reservist contract that the contract provision expressly provided for changes in the obligation "as provided by law" and thus held the statute, 28 U.S.C. § 673(a) applicable to the reservist situation. Here the section could have had no application even had it been exacted ten years previous, because the parties had expressly contracted for a maximum of 45 days, not the 556 days for which the administrative order herein calls. This is not a question of the law altering the contract; it is a case of the administrative order ignoring the contract provision, as so aptly stated by Judge Ferguson in Harmonson v. United States, Civil No. 68-2109 - F. (C.D. Calif.) March 18, 1969:

> "* * * where an enlistment contract limits the amount of time for which an enlisted Reservist may be called to active duty by reason of unsatisfactory performance, Section 673(a) is no longer available to authorize a longer call-up for that reason in the absence of a contractual provision which might encompass such authority."

The Second item raised is that under the law reservists are clearly entitled to not less than thirty (30) days notice of a

change in status or active duty under the provision of 28 U.S.C. § 672(d). This is not a new provision; this is a provision of long standing. Neither the District Court nor the 8th Circuit Court of Appeals has mentioned in the decision the effect of this statute, which certainly should have as much standing as 28 U.S.C. §673(a) under which the Courts have held that the petitioner is liable to have imposed upon him 556 days of active duty, including prompt and immediate assignment to overseas duty. (The orders call for an immediate transfer to an APO unit, which is overseas assignment, to a reservist who is charged with not "participating satisfactorily". As a *need* of the government for this individual, it has no logic.) But in *this* case the notice to active duty was dated January 2, 1968 to report on January 17, 1968, a total period of 15 days including time for delivery of the mails which certainly appears on its face to be an administrative order in defiance of section 672(d).

As the 8th Circuit Court has made clear in its decision what transpired thereafter may give some justification for the petitioner's non-appearance on January 17, 1968, at Fort Leonard Wood, and give some justification for the delay until August of 1968 when he was notified that the F.B.I. sought his apprehension and he voluntarily surrendered to the F.B.I. for confinement in the Hennepin County Jail in Minneapolis, Minnesota, as a deserter from which confinement he has sought release under a Writ of Habeas Corpus. (While the petitioner has not spent the time in jail which this proceedings have followed its course through the Courts, he has yet been under the confines and restrictions of a personal recognizance release and bond during this time.)

It has from the very date of his receipt of the order to active duty after the processing by his Selective Service Local

Board, that this entire procedure has appeared incredible to the petitioner. While processing his claim for a conscientious objector status with his Local Board, he wrote the National Guard unit as a precaution for information as to a discharge as a conscientious objector. The Selective Service Local Board gave him a 1-A 5 classification which has the effect of being in a class lower than 1-D, since no orders for active duty could be given to a person with a 1-A category 5 classification. This arose because in the summer of 1967 the petitioner passed his 26th birthday. (The Local Board apparently chose to do this, even though the petitioner may have had extended liability to age 28, for their own discretionary reasons which are not material here.)

But under the circumstance here, apparently, even though having caused the petitioner to lose his 1-D classification, the commanding officers of the petitioner's National Guard (with whom petitioner has had substantial emotional conflict) processed the petitioner for activation under section 673(a), then newly adopted by Congress, instead of recognizing the assertions of religious convictions by the petitioner, which certainly concepts of religious liberty and due process require, as has been so well set forth in Lurie v. U.S. 402 F. 2d 297 (CA5 1968) 1 SSLR3198, which dealt with similar proceedings under the Selective Service System. An order to report for induction was held invalid in Lurie v. United States, supra. Lurie was a Texas National Guardsman who had ceased to perform satisfactorily and was reclassified from 1-D to 1-A and ordered to report for induction. He filed a Form 150 (application for CO classification) and his local board refused to consider it. The Court held that there was a right to consideration, and until this had been done, any order for induc-

tion was invalid. By analogy, orders to active duty before consideration of a reservist's application for CO discharge, is equally a denial of due process. Certainly it would not be unreasonable to require the same standards of both the Reserve Units and the Army itself. (The Court should bear in mind that all of this transpired before the adoption of DOD 1300.6, which was not adopted until subsequent to all proceedings herein). Both the National Guard Unit and the Department of the Army have chosen to ignore, and indeed claim the right to ignore, the petitioner's entreaties for forms and information so as to be able to assert his religious convictions.

Thus it is that the petitioner seeks a review and hearing on his case before the Supreme Court, both to prevent what he considers a grave injustice to himself and also because the questions presented and the issues that exist and need meaningful answer, are of great importance to many young men like petitioner who today are caught between their contract rights, religious convictions and the unfettered administrative orders of the military which interfere with civilian living. The case warrants the complete consideration of the Court in the same way and for the same reason as those which existed in Gutknecht v. United States, —— U.S. —— decided January 20, 1970, Law Week, Volume 38, No. 28.

CONCLUSION

For the reasons set forth above the Writ should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

STATEMENT OF CASE

Petitioner enlisted in the Army National Guard of Minnesota on December 28, 1963. He served satisfactorily until February of 1967 when he decided that he could no longer participate in the required National Guard drills. This decision was based on petitioner's conscientious objection to killing and war. Petitioner has not participated in any National Guard activities since February of 1967.

On February 17, 1967, the commanding officer of petitioner's unit sent a DD form 44 to petitioner's Selective Service Local Board indicating that petitioner had ceased to serve satisfactorily as a member of the National Guard.

After receipt of the February 17th form, petitioner's Local Board withdrew his I-D classification and reclassified him I-A. Subsequent to being re-classified petitioner applied to his Local Board for classification as a conscientious objector. His application was denied and petitioner filed an appeal. On September 15, 1967, petitioner was notified that since his induction was not imminent his appeal would not be submitted to the appeal board until 120 days prior to his probable induction. No further action has been taken on this appeal.

In April of 1967, petitioner talked to his commanding officer about being discharged from the National Guard as a conscientious objector but was unable to "communicate" with him. On or about July 26, 1967, petitioner wrote to his National Guard unit requesting confirmation of his discharge from the National Guard and asking for a discharge if one had not already been granted. He also requested information

on how to apply for conscientious objector status. In August of 1967 petitioner again wrote to his unit commander and the State Adjutant General requesting a discharge and a DA form 1049 in order to apply for discharge as a conscientious objector.

On August 14, 1967, a letter was sent to petitioner informing him that the appropriate forms for application were available at the Armory in Mankato and that it was necessary for him to come to Mankato to clear his records and to be informed of his rights. Petitioner denies receiving this letter. From the record it appears that from September of 1967 until January 2, 1968, petitioner had no further contact with the National Guard. On January 2, 1968, petitioner received orders to report for active duty on January 17, 1968, at Fort Leonard Wood, Missouri, for a period of one year, six months, and sixteen days. Under 28 U.S.C. 673 (K). On January 9, 1968, petitioner wrote to the Headquarters Fifth Army, Fort Sheridan, Illinois, requesting a rescission and postponement of his "induction notice" until his application for discharge had been processed.

Petitioner also contacted his attorney and a Mr. Sherk, the Executive Secretary of the National Service Board for Religious Objectors, in Washington, D.C. Mr. Sherk contacted a Mr. Kenneth B. Haggett of the National Guard Office in Washington, who apparently assured Mr. Sherk that petitioner's order to active duty would be delayed or cancelled until petitioner's application for discharge was processed.

On or about February 1, 1968, petitioner received a telegram informing him that the order of January 2, 1968, had not been cancelled. On the 9th of February petitioner received in the mail his honorable discharge from the Minnesota National Guard with the effective date of January 16, 1968. On May

30, 1968, an Absentee Wanted Form was issued, and on August 16, 1968, petitioner was arrested as a deserter.

ENLISTMENT AGREEMENT
(Age 17 through 25)

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I incur a military service obligation of 6 years.

I will participate with my unit in scheduled training effective immediately.

I will enter on active duty for training for a period of approximately 26 weeks (enter time required for training in designated MOS) within 120 days of this date, unless a delay for a longer period is authorized by the Department of the Army. If I am a high school student, I may be delayed in reporting for active duty for training for not more than one year, until I graduate, until I cease to pursue such course satisfactorily, or until I become 20 years of age, whichever occurs earlier.

After completing the active duty for training, I will serve in the Ready Reserve for the remainder of my 6 year military service obligation. If for any reason I cannot satisfactorily complete the required training (schooling) in the MOS for which originally entered on active duty for training, I will be required to accept training of a duration not to exceed 6 months to qualify in an alternate MOS as determined by the Army and/or my unit commander.

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I must, prior to moving to another location (town, city, community, state), report any change of address to my unit commander or his representative. Within 30 days after arriving at my new home of residence, I must report to the nearest Army National Guard Armory or U. S. Army Reserve Training Center for instructions and possible assignment. If, prior to this time, I have not performed my initial active duty for training as agreed to above, I realize that, at a time convenient to the Service but in any case before I have completed one year of my 6 year military service obligation, I must enter on *this* active duty for training or 6 months active duty for training as determined by the needs of the service in my new area of residence.

I must reply promptly to any military correspondence directed to me. I further understand that—

If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction.

In the event of war or national emergency declared by Congress my enlistment, which would otherwise expire, will be

continued in effect until 6 months after the end of such war or emergency, unless sooner terminated.

DARWIN EARL SCHULTZ
DWAYNE C. BOERNER

Darwin Earl Schultz
(Typed First, Middle, Last Name)
Dwayne C. Boerner
Capt. Inf.
(Typed Name Unit Commander or
Authorized Representative (Witness)

Petitioner raises three issues in his petition for a writ of habeas corpus. First, petitioner argues that his application for discharge as a conscientious objector must be processed by the proper authorities before there can be any order for active duty or participation inconsistent with his claimed beliefs.

Second, petitioner argues that the National Guard returned jurisdiction over petitioner to the Selective Service System when it reported that petitioner was no longer participating satisfactorily.

Third, petitioner argues that his Enlistment Agreement provides for sanctions in the event of failure to serve satisfactorily and that an order to active duty for more than forty-five days is a violation of his agreement.

Petitioner's first argument is based on paragraph 6 of Army Regulation 635-20, which provides:

> "[A]n individual who applies for discharge based on conscientious objection will be retained in his unit and assigned duties providing the minimum conflict with his professed beliefs pending a final decision on his application. . . ."

This regulation applies only to members of the Army on active duty. The applicable regulation is Cir. 135-25 which covers members of reserve components. This regulation does not provide for release from conflicting duties. For this reason Cir. 135-25 is not a bar to petitioner's call to active duty, even assuming that a proper application had been made.[1]

Petitioner's second argument is based in part upon *Mader v. Clifford*, No. 48612 (N.D. Calif. July 26, 1968). In *Mader* plaintiff was certified to his draft board as an unsatisfactory participant in the reserves while his application for a conscientious objector discharge was being processed. Petitioner was reclassified I-A by his draft board. After his application for discharge was disapproved, plaintiff was certified for priority induction as an unsatisfactory participant in the reserves. Subsequently plaintiff was ordered to active duty by the Marine Corps for a period of twenty months. Plaintiff refused to obey this order and was declared a deserter. The District Court stated:

> "[A]ssuming the Marine Corps had a choice to certify plaintiff to his draft board as an unsatisfactory participant or to order him to active duty as an unsatisfactory participant, once it chose to certify him to the draft board as an unsatisfactory participant, it could not deny him the procedural rights of review and appeal of his I-A classification. Therefore, the subsequent order to report for active duty would be invalid. . . ."

Here petitioner was never certified for priority induction.

Under 50 U.S.C. App. § 456(c) (2)C petitioner was not exempt from "registration, training [or] service by induction"

under the Universal Military Training and Service Act because he was a member of the National Guard. He was, however, eligible to be placed in the I-D class for National Guard members who are participating satisfactorily. 32 C.F.R. § 1622.13. Because he was no longer eligible to be placed in this category, petitioner was reclassified by his Local Board. That this was a separate process from being certified for priority induction may be inferred by this reclassification. Priority induction is governed by 32 C.F.R. § 1631.8, which provides that any person who is certified for induction "shall be ordered to report for induction by the local board regardless of the class in which he is classified and *without changing his classification.*" [Emphasis added.] This regulation makes reclassification unnecessary if the person is to be inducted for failure to satisfactorily perform his National Guard duties. Since petitioner was not certified for priority induction, the *Mader* case does not apply and the petition cannot be granted on these grounds.

Petitioner also argues that his discharge from the National Guard ended any obligation he may have had to the Armed Forces and returned jurisdiction over him to the Selective Service System. This argument is based on the fact that the Enlistment Record which petitioner signed contains two oaths of enlistment—one for service in the National Guard and another for service in the Regular Army or Army Reserve. Petitioner signed only the National Guard oath. This oath provides:

> "I do hereby acknowledge to have voluntarily enlisted this 28th day of December, 1963, in the Army National Guard of the State of Minnesota and as a Reserve of the Army with membership in the Army National Guard of the United States for a period of (6) six years under the con-

ditions prescribed by law, unless sooner discharged by proper authority."

Petitioner's Enlistment Agreement also provides for service as a Reservist. In addition, 10 U.S.C. § 269(b) provides that "[T]he units and members of the Army National Guard of the United States . . . are in the Ready Reserve of the Army . . ."

On the basis of petitioner's Enlistment Record, Enlistment Agreement, and § 269(b) it is clear that petitioner was serving in the dual capacity of National Guard member and Ready Reservist. It is also clear that petitioner's discharge from the National Guard did not relieve him of his Ready Reserve obligation, but was only for the purpose of giving jurisdiction over him to the Ready Reserve as set forth in Cir. 135-10 para. 13(b). Paragraph 13(b) provides:

> "State adjutants general will identify to the appropriate area commander those ARNGUS members who are to be ordered to active duty as Reserves of the Army. Members so identified will be discharged from their ARNG status by the State Adjutant General, effective the day prior to the date the member is scheduled to report to active duty."

Petitioner's third argument is that the sanctions for unsatisfactory participation in the Army National Guard of Minnesota are limited by his Enlistment Agreement which states:

> "If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction."

Petitioner was ordered to active duty pursuant to 10 U.S.C. § 673a, enacted June 30, 1967, which provides:

"(a) Notwithstanding any provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;

(2) has not fulfilled his statutory reserve obligation; and

(3) has not served on active duty for a total of 24 months.

"(b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period."

Petitioner claims that the application of § 673a to him was in violation of his Enlistment Agreement and deprived him of valuable contract rights without due process of law, since he had enlisted prior to its enactment.

The applicability and constitutionality of § 673a has been discussed in a series of recent cases involving the call to active duty of reservists for disciplinary and other reasons. *Winter v. United States,* 281 F. Supp. 289 (E.D. N.Y. 1968), *aff'd,* 390 F. 2d 879 (2d Cir. 1968); *Gion v. McNamara,* Civil No. 67-1963-S (C.D. Calif. January 8, 1968); *Fox v. Brown,* 286 F. Supp. 855 (S.D. N.Y. 1968); *Ali v. United States,* Civil No. 68-986-S (C.D. Calif. July 2, 1968); *Pfile v. Corcoran,* Civil No. C-824 (D. Colo. July 19, 1968); *Even v. Clifford,* 287 F. Supp. 334 (S.D. Calif. 1968); *Morse v. Boswell,* Civil No. 19734 (D. Md. August 6, 1968).

In both *Winter* and *Fox* the enlistment contract contained a provision which could be interpreted as subjecting the enlistee to the effect of subsequently enacted legislation. Petitioner's Enlistment Agreement contains no such language[2] and for this reason these cases are not directly in point. *Boswell* and *Ali* involved the call up of units of reservists and unassigned reservists, respectively, and therefore are not directly in point.

In *Gion* a reservist who had enlisted prior to June 30, 1967, was ordered to active duty for a period of sixteen months for unsatisfactory participation in the Ready Reserve pursuant to §673a. The Court held:

> "1. Petitioner's status as Ready Reservist is based upon contract. In accordance with said contract Petitioner may not be ordered without his consent to perform more than forty-five (45) days of additional duty for training for unsatisfactory participation in the Ready Reserve.
>
> "2. The ordering of Petitioner to involuntary active duty for more than forty-five (45) days because of unsatisfactory participation in the Ready Reserve, pursuant to authority derived from . . . [10 U.S.C. § 673a], constituted a violation of Petitioner's enlistment contract, and application of said Public Law as to petitioner constituted a violation of the due process clause of the Fifth Amendment to the Constitution of the United States."

Petitioner relies upon *Gion* to support his claim that his order to active duty was in violation of his Enlistment Agreement and the due process clause.[3] However, the *Gion* opinion fails to deal with two important questions concerning the application of § 673a. First, does § 673a deprive a reservist of

any substantial contract rights; and, second, if it does, may these rights be abrogated by the sovereign, constitutionally, in the exercise of a paramont power?

The Court in *Even v. Clifford, supra,* answered the first question negatively, noting that a reservist reported to the Selective Service for priority induction may be required to serve twenty-four months on active duty, whereas under § 673a the delinquent reservist is given credit for active duty already served. The Court stated:

> "Under [§ 673a] petitioner has not been deprived of any substantial rights under his enlistment contract. In fact, petitioner's position has been improved for the reasons previously noted. To hold the government strictly bound by the enlistment contract in this case would indirectly fetter the power of Congress to enact uniform and practical regulations for the administration of the armed forces." 287 F. Supp. at 338.

The Court in *Pfile v. Corcoran* answered the second question affirmatively. The Court stated:

> "Under certain circumstances the legislature has power, as an attribute of sovereignty, to enact laws which alter existing contracts, whether made between private parties or between the Government and private citizens. See *City of El Paso v. Simmons,* 379 U.S. 497 (1965).
>
> * * *
>
> ". . . [A]brogation of contracts by the legislature is permissible where the abrogation occurs through the exercise of some paramount power of the sovereign, and the abrogation operates to further the ends sought to be achieved in the exercise of this power.
>
> * * *

"The present statute can be regarded as falling within the 'wide discretion' which Congress possesses in the exercise of its powers 'to declare war,' (Const. Art. I, sec. 8, cl. 11), 'to raise and support armies,' (Const., Art. I, sec. 8, cl. 12), and 'to make rules for the government and regulation of the land and naval forces' (Const. Art. I, sec. 8, cl. 14). These are collectively known as the War Powers, and the statute appears validly applicable to petitioner, even if it contravenes his enlistment contract. It is unnecessary to determine whether the present conflict is a state of war. It is sufficient to note that the condition is scarcely a state of peace, and that the action of Congress is in the interests of national security. Finally, we are constrained to hold that a contract such as the present one always stands in the shadow of the exercise by Congress of positive paramount sovereign powers."

In this case, as in *Even*, since petitioner was subject to priority induction for twenty-four months under his Enlistment Agreement and for active duty for extended periods under other statutes, see, *e.g.*, 10 U.S.C. §§ 672(a) and 673(a), § 673a does not deprive him of any substantial contract rights without due process of law. In addition, assuming the rationale of *Even* does not apply, the rationale of *Pfile* does, and petitioner's contract must give way before the exercise by Congress of the War Powers.

For the above stated reasons petitioner's application for a writ of habeas corpus must be denied.

EARL R. LARSON

FOOTNOTES

[1] The Court has not passed on the validity of petitioner's application for a discharge based on conscientious objection, for the reason that it appears that a proper application has not been filed. Both of the regulations concerning conscientious objection discharges require extensive information, references, interviews, and counseling sessions. If petitioner wishes to maintain his position that the two letters of August and September of 1967 constitute an application for discharge, that is his privilege. However, it is the Court's opinion that an application based on the information contained therein would be denied. The Court holds that petitioner's call to active duty is not barred by Cir. 135-25 and does not pass on the issue of whether his application is sufficient or whether petitioner must be "assigned to duties providing a minimum conflict with his professed beliefs" when he is placed on active duty.

[2] Petitioner's oath of enlistment contains the words "under the conditions prescribed by law." In *Pyle v. Corcoran*, Civil No. C-824 (D. Colo. July 19, 1968), the Court recognized that this oath, if it constituted the contract, might be construed to incorporate future changes in the law. However, the Court held that the "specific, detailed Statement of Acknowledgment [Enlistment Agreement] constituted the enlistment contract, rather than the brief, more general oath." To the extent that the relationship between petitioner and the armed forces is based on contract, this is the proper conclusion. Therefore this Court must look to the Enlistment Agreement.

[3] *Gion* is of doubtful precedential value since on very similar facts the Court in *Winter* held that § 673a was not a violation of the enlistment contract. In *Winter* the Court stated:

> "Both the enlistment contract and the Statement of Understanding contemplate that the obligations which the enlisted man undertakes include not only additional active duty imposed in a national emergency or in time of war but also additional active duty 'otherwise prescribed by law' or 'as the law may require.' Neither the enlistment contract nor the Statement of Understanding says in so many words that it means duty prescribed by law whether already enacted or hereafter passed, but that is the evident and necessary meaning of any language so used in such instruments. Were such instruments construed otherwise they would in effect fetter and embarrass the power of the President and Secretary of Defense to adopt uniform and practical regulations for the administration of the armed forces and the Ready Reserve, and could indeed operate as a fetter upon Congress itself, which would have to take action in contemplation of the existence of a large number of such agreements in force at any one time, and which

it would be only appropriate, even if not necessary, that Congress should consider in enacting new law."

Moreover, the rationale of the *Gion* case has not been followed by the District Court which decided it. In *Ali* the Court stated:

"[A] military enlistment contract is not an insulating document which legally prevents the Government of the United States from recalling to active duty an enlistee pursuant to an act of Congress which was passed after the date of enlistment, although such recall is not expressly provided for in the terms of his enlistment contract; and that in this case, the recall of the plaintiffs to active duty was not tied to their respective enlistment contracts but was predicated upon Congress' right to raise an Army, as well as [§ 673a]. . . ."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,583

Darwin Earl Schultz,

Appellant,

vs.

Honorable Clark Clifford, Secretary of Defense, and the Commanding Officer of Fort Leonard Wood, Missouri, the Sheriff of Hennepin County, and the Agent in Charge of the Office of the Federal Bureau of Investigation in Minneapolis, Minnesota,

Appellees.

[October 29, 1969.]

Appeal from the United States District Court for the District of Minnesota.

Before Matthes, Gibson and Bright, Circuit Judges.

Per Curiam.

Darwin Earl Schultz, a member of the Army Reserve, refused to report to Fort Leonard Wood, Missouri, when called to active duty. Thereafter, he was arrested as a possible de-

serter from the armed forces. He petitioned the district court seeking release from his arrest and seeking to bar the Army from exercising any jurisdiction over his person. The trial court denied the writ and the petitioner appeals. We have jurisdiction, 28 U.S.C. §2253, and we affirm.

Appellant enlisted in the Minnesota National Guard in 1963 and by the enlistment, he also acquired an Army Reserve status. he served in the guard satisfactorily until February of 1967, when he returned his equipment to unit headquarters and stated that he had become a conscientious objector. From February of 1967, until January of 1968, he attended only one regularly scheduled drill and did not attend summer Guard camp.[1] Because Schultz no longer satisfactorily served, he lost his deferred status under Selective Service and was reclassified 1-A (5th priority). However, his age group, over twenty-six, has not been subject to call.

Appellant sent letters to his National Guard unit stating his desire to be discharged as a conscientious objector and requesting forms that he might fill out. Army Regulation 135-25 requires that the applicant for discharge as a conscientious objector receive personal counseling and provide the military with specified supporting information. An officer in his unit wrote Schultz on August 14, 1967, notifying him that he should report to his unit headquarters for forms and information concerning his rights. Schultz denied receiving the letter.

Schultz received activation orders on January 2, 1968, requiring him to report to Fort Leonard Wood, Missouri, on January 17. On January 9, petitioner wrote the Fifth Army headquarters, which had issued his orders, requesting that

[1] At the trial, appellant said that he did not attend summer camp because he had a broken ankle. He did not notify his National Guard unit of his physical disability.

his "induction notice" be rescinded or postponed until his claim of conscientious objection could be processed. Contemporaneously, and through his attorney, he sought to have the Executive Secretary of the National Service Board for Religious Objectors in Washington, D.C. intervene and seek cancellation of his orders. About February 1, petitioner received a telegram from Fifth Army headquarters advising him that only the National Guard could request a change in his orders to active duty and that ". . . unless they advise us to amend or revoke your orders you will report for active duty as scheduled". The record discloses no further attempt by Schultz to clarify his status, although upon oral argument, his counsel advised that he had asked a United States Senator from Minnesota to intervene with military authorities.

Schultz was called to active duty as a reservist not serving satisfactorily under the authority of 10 U.S.C. §673(a), reading as pertinent:

> "§673a. Ready Reserve: Members not assigned to, or participating satisfactorily in, units
>
> (a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—
>
> (1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;
>
> * * *"

On appeal, petitioner asserts he presented the trial court with an adequate reason to issue the writ: (a) that the active duty order is invalid and without due process because the National Guard refused to furnish Schultz appropriate forms under which he could apply for a discharge as a conscientious objector; (b) that the order requiring him to report for active

duty constituted an unlawful modification of provisions of his enlistment contract which pre-dated the enactment of the statute on which the activation order was based, 10 U.S.C. §673(a); (c) that having reported Schultz as a delinquent reservist to Selective Service, the military possessed no power under 10 U.S.C. §673(a) to punish him by ordering him to active duty.

The trial judge, the honorable Earl R. Larson, considered each of these contentions. We have reviewed them. In affirming, we adopt Judge Larson's opinion reported in . . . F. Supp. . . . (D.Minn. 1968).

However, in disposing of the matter, we are constrained to add another comment. It is true that Schultz, though having the advice of counsel since June of 1967, failed to seek discharge as a conscientious objector in the manner specified by the regulations and he ignored the order requiring him to report for active duty. One may conclude that he was misguided or that he refused to heed good advice. In any event, this young man has breached military discipline,[2] but, as yet, he has not had the opportunity to fairly present his claim to be discharged as a conscientious objector. Upon issuance of this court's mandate, Darwin Schultz, who had previously been released on bail, will again be subject to Army jurisdiction. Department of Defense Directive 1300.6 permits a soldier on active duty to seek discharge as a conscientious objector. Should Schultz apply for such discharge, the Army, under that directive and its own Army Regulation 635-20, must af-

[2] We here determine only that Schultz was subject to his activation order. We do not consider whether desertion, the charge upon which he was arrested, may be sustained. Such charge requires an intent to *permanently* remain away from a military unit. 10 U.S.C. §885. A person acting under advice of counsel might not possess such intent.

ford Schultz fair consideration of his claim. See, *Hammond v. Lenfest*, 398 F. 2d 705 (2d Cir. 1968). We assume it will do so.

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.